

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Plaintiff filed a Complaint on November 4, 2008, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for a period of disability ("POD") and disability insurance benefits ("DIB"). On February 4, 2009, the parties consented to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on July 1, 2009, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, in the alternative, remanding the matter for further administrative proceedings; and defendant seeks an order affirming the Commissioner's decision. The Court has taken the parties' Joint Stipulation under submission without oral argument.

SUMMARY OF ADMINISTRATIVE PROCEEDINGS

On February 21, 2006, plaintiff filed applications for a POD and DIB. (Administrative Record ("A.R.") 34-35.) Plaintiff alleges an inability to work since November 10, 2004, due to disorders of the spine. (A.R. 34.) Plaintiff has past work experience as a lumber yard supervisor, building maintenance man, power wash operator, and carpenter. (A.R. 88-92.)

The Commissioner denied plaintiff's application initially and upon reconsideration. (A.R. 36-39, 43-47.) On April 24, 2008, plaintiff, who was represented by counsel, testified at a hearing before Administrative Law Judge Robert Evans ("ALJ"). (A.R. 14-33.) On May 29, 2008, the ALJ denied plaintiff's claim, and the Appeals Counsel subsequently denied plaintiff's request for review of the ALJ's decision. (A.R. 5-13, 1-4.)

SUMMARY OF ADMINISTRATIVE DECISION

In his written decision, the ALJ found that plaintiff met the insured status requirements of the Social Security Act through June 30, 2007, and plaintiff has not engaged in substantial gainful activity since November 10, 2004, his alleged disability onset date. (A.R. 11.) The ALJ further found that plaintiff suffers from the severe impairment of chronic back pain, but he does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (A.R. 12.)

1 The ALJ determined that plaintiff retains the residual functional
2 capacity ("RFC") to perform light work that would require him to: lift
3 and carry 20 pounds occasionally and 10 pounds frequently; walk and
4 stand for two hours in an eight hour work day with a sit/stand option
5 and sit for six hours in an eight hour work day; and engage in
6 occasional climbing, bending, kneeling, stooping, crouching, and
7 crawling. (A.R. 10.) The ALJ further found that plaintiff's testimony
8 concerning his pain and limitations was not "sufficiently credible."
9 (*Id.*)

10
11 Based on the ALJ's residual functional capacity assessment and the
12 testimony of a vocational expert, the ALJ found that plaintiff is unable
13 to perform any of his past relevant work, but jobs exist in significant
14 numbers in the national economy that plaintiff can perform. (A.R. 12.)
15 Accordingly, the ALJ concluded that plaintiff has not been under a
16 disability, as defined in the Social Security Act, from November 10,
17 2004, the alleged disability onset date, through the date of the ALJ's
18 decision. (*Id.*)

19 20 STANDARD OF REVIEW

21
22 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
23 decision to determine whether it is free from legal error and supported
24 by substantial evidence in the record as a whole. Orn v. Astrue, 495
25 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
26 evidence as a reasonable mind might accept as adequate to support a
27 conclusion.'" Id. (citation omitted). The "evidence must be more than
28 a mere scintilla but not necessarily a preponderance." Connett v.

1 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the
2 record can constitute substantial evidence, only those "'reasonably
3 drawn from the record'" will suffice. Widmark v. Barnhart, 454 F.3d
4 1063, 1066 (9th Cir. 2006)(citation omitted).

5
6 Although this Court cannot substitute its discretion for that of
7 the Commissioner, the Court nonetheless must review the record as a
8 whole, "weighing both the evidence that supports and the evidence that
9 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
10 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
11 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
12 responsible for determining credibility, resolving conflicts in medical
13 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
14 1035, 1039-40 (9th Cir. 1995).

15
16 The Court will uphold the Commissioner's decision when the evidence
17 is susceptible to more than one rational interpretation. Burch v.
18 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
19 review only the reasons stated by the ALJ in his decision "and may not
20 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
21 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
22 the Commissioner's decision if it is based on harmless error, which
23 exists only when it is "clear from the record that an ALJ's error was
24 'inconsequential to the ultimate nondisability determination.'" Robbins
25 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
26 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400
27 F.3d at 679.

1 DISCUSSION

2
3 Plaintiff alleges the following two issues: (1) whether the ALJ
4 properly determined that plaintiff did not meet or equal a listing; and
5 (2) whether the ALJ made a proper credibility finding. (Joint
6 Stipulation ("Joint Stip.") at 3.)

7
8 I. The ALJ Failed To Provide The Requisite Clear And Convincing
9 Reasons For Rejecting Plaintiff's Subjective Pain Testimony.

10
11 Plaintiff alleges that the ALJ improperly rejected plaintiff's
12 subjective pain testimony. (Joint Stip. at 13-16.) For the reasons set
13 forth below, the Court agrees.

14
15 The law is well-settled that, once a disability claimant produces
16 evidence of an underlying physical impairment that is reasonably likely
17 to be the source of her subjective symptom(s), all subjective testimony
18 as to the severity of the symptoms must be considered. Moisa v.
19 Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947
20 F.2d 341, 345 (9th Cir. 2001)(*en banc*); see also 20 C.F.R. § 404.1529(a)
21 (explaining how pain and other symptoms are evaluated). Unless there is
22 affirmative evidence showing that the claimant is malingering, the ALJ's
23 reasons for rejecting the claimant's subjective symptom testimony must
24 be "clear and convincing." Lester v. Chater, 81 F.3d 821, 834 (9th Cir.
25 1995). Further, the ALJ's credibility findings must be "sufficiently
26 specific" to allow a reviewing court to conclude that the ALJ rejected
27 the claimant's testimony on permissible grounds and did not arbitrarily
28 discredit the claimant's testimony. Moisa, 367 F.3d at 885.

1 The ALJ found that plaintiff's "subjective complaints [were] not
2 sufficiently credible." (A.R. 10.) While the ALJ cites several reasons
3 for discounting plaintiff's credibility, his findings are based largely
4 on impermissible mischaracterizations of the record.

5
6 First, the ALJ found that there was "no evidence plaintiff used
7 home remedies such as a heating pad," and therefore, it was "reasonable
8 to assume that his pain is not as severe or limiting as he alleged."
9 (A.R. 10.) This finding directly contradicts the record. At the
10 hearing, the ALJ asked plaintiff if he used any home remedies such as
11 heating pads or cold packs. (A.R. 23.) Plaintiff responded, "[I] put
12 [on] some heating pads when it's hurting. When it's swelling up I put
13 [on] cold pad[s]." (*Id.*) The ALJ's conclusion that plaintiff did not
14 use any home remedies is a blatant misstatement of the record.

15
16 The ALJ also found that plaintiff's testimony regarding his ability
17 to work was inconsistent. The ALJ stated that plaintiff "denied looking
18 for work because of his 'limitations' but opined that he could probably
19 do light work (per testimony)." (A.R. 10.) However, the record
20 indicates that when the ALJ specifically asked plaintiff if he had ever
21 thought about lighter work, plaintiff responded, "I thought about it.
22 The only thing is I don't have no experience on anything else. That's
23 something that's really keeping me away." (A.R. 22) While the ALJ is
24 permitted to draw inferences from the record, only those "reasonably
25 drawn from the record" will suffice. Widmark v. Barnhart, 454 F.3d
26 1063, 1066 (9th Cir. 2006)(citation omitted); Regennitter v.
27 Commissioner, 166 F.3d 1294, 1297 (9th Cir. 1999)("inaccurate
28 characterization of the evidence" constitutes error). Here, the ALJ

1 characterized plaintiff's statement that he had "thought about" light
2 work as constituting an opinion that he probably would be capable of
3 doing light work. This tenuous inferential step mischaracterizes the
4 record.

5
6 Further, the ALJ found that plaintiff's pain testimony lacked
7 credibility in part because he had not received ongoing treatment. The
8 record shows, however, that plaintiff obtained almost monthly treatment
9 with Dr. Latteri through March 3, 2008. (A.R. 229-32.) Additionally,
10 when the ALJ asked plaintiff if he was still seeing his doctor,
11 plaintiff responded that he was. (A.R. 30.) Once again, the ALJ
12 misstated the record to support his finding that plaintiff's subjective
13 symptoms lack credibility.

14
15 The ALJ cited additional grounds on which to discredit plaintiff's
16 testimony that the Court finds unconvincing. Specifically, in support
17 of his finding that plaintiff lacked credibility, the ALJ concluded that
18 plaintiff's daily activities were inconsistent with his subjective
19 complaints, plaintiff declined surgery, and plaintiff only received
20 treatment in connection with his worker's compensation claim. (A.R. 10)

21
22 The ALJ cited plaintiff's ability to "[take] walks, [do] light
23 household chores, and [drive] his car" as inconsistent with his
24 subjective pain complaints. (A.R. 10.) The ALJ's casual reference to
25 plaintiff's limited ability to engage in daily activities to support his
26 adverse credibility finding fails to demonstrate how plaintiff's
27 performance of basic self-care activities, light household chores, and
28 occasional driving translates into the ability to engage in full-time

1 work.¹ See Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th Cir.
2 1990)(noting that daily activities may not be relied upon to support an
3 adverse credibility decision where those activities do not affect the
4 claimant's ability to perform appropriate work activities on an ongoing
5 and daily basis); Fair v. Bowen, 885 F.2d 597, 602 (9th Cir. 1989)("if
6 a claimant is able to spend a substantial part of his day engaged in
7 pursuits involving the performance of physical functions that are
8 transferable to a work setting, a specific finding [which was not made
9 in the instant case] as to this fact may be sufficient to discredit an
10 allegation of disabling excess pain.").

11
12 The ALJ also relied on the fact that plaintiff declined surgery to
13 discredit his subjective pain complaints. (A.R. 10.) While a failure
14 to seek prescribed treatment may be an adequate reason to discredit a
15 plaintiff's subjective symptoms, the ALJ must first consider "any
16 explanations that the individual may provide, or other information in
17 the case record, that may explain [the] . . . failure to seek medical
18 treatment." See Social Security Ruling ("SSR") 96-7p. The record
19 indicates that plaintiff declined back surgery, because he was
20 frightened of the possible risks involved. (A.R. 146, 229, 265.) It is
21 unconvincing that plaintiff's failure to submit to the risk of surgery
22 negates his credibility as to the severity of his pain. The ALJ erred

23
24 ¹ The Court notes that plaintiff's daily activities reflect his
25 ability to: dust the house, clean the bathroom, weed and water the
26 flower bed, and drive 20 miles before feeling discomfort, which may
27 contradict plaintiff's allegations of pain and inability to engage in
28 light work. (A.R. 94.) However, when discrediting plaintiff's
testimony, the ALJ must cite "sufficiently specific" reasons to allow a
reviewing court to conclude that the ALJ rejected the claimant's
testimony on permissible grounds. Moisa, 367 F.3d at 885. The reasons
cited by the ALJ here are too vague to support the finding that his
testimony lacks credibility.

1 in failing to consider any of the possible explanations for plaintiff's
2 refusal to undergo back surgery before discrediting his testimony.

3
4 Finally, the ALJ noted that the only treatment plaintiff received
5 was in connection with his worker's compensation claim. (A.R. 10.)
6 This too is an unconvincing reason to discount plaintiff's credibility.
7 If plaintiff obtained adequate medical treatment, it is irrelevant that
8 the treatment he received was in connection with his worker's
9 compensation claim. A plaintiff should not be required to receive
10 duplicative care to avoid having his credibility challenged for pursuing
11 medical treatment in connection with a worker's compensation claim. In
12 addition, although plaintiff began treating with Dr. Latteri
13 concurrently with the initiation of his worker's compensation claim, he
14 continued such treatment after his worker's compensation claim
15 concluded.² Therefore, the treatment he received was not related *solely*
16 to his worker's compensation claim, as the ALJ suggests.

17
18 Accordingly, the ALJ's rejection of plaintiff's credibility,
19 without setting forth clear and convincing reasons for that rejection,
20 constitutes reversible error.

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26 _____
27 ² Plaintiff's worker's compensation claim was settled in February,
28 2007. (A.R. 20.) Records indicate that Dr. Latteri continued treating
plaintiff through at least June 2008. (A.R. 234.)

1 **II. The ALJ Failed To Identify Substantial Evidence Supporting His**
2 **Conclusion That Plaintiff Did Not Meet a Listed Impairment.**

3
4 **A. The ALJ's Conclusion That Plaintiff Did Not Meet a**
5 **Listing Was Not Supported By Sufficient Evidence.**
6

7 Plaintiff contends that the ALJ's finding that he does not meet or
8 equal listing 1.04 (disorders of the spine) is not supported by
9 substantial evidence. (Joint Stip. at 3.) For the reasons set forth
10 below, the Court agrees.
11

12 The ALJ's discussion of whether plaintiff met or equaled a listing
13 was limited to one conclusory sentence: "The objective medical evidence
14 shows that he does not have an impairment or combination of impairments
15 that meet or equal the level of severity required by the Listing of
16 Impairments in Appendix 1 of Subpart P, Regulations No. 4." (A.R. 9.)
17 The ALJ did not cite any evidence of record to support his conclusion
18 that plaintiff did not meet a listing, nor did he even identify the
19 relevant listing. "Such a bare conclusion is beyond meaningful judicial
20 review." Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996).
21

22 An ALJ must evaluate the relevant evidence before concluding that
23 a claimant's impairments do not meet or equal a listed impairment.
24 Lewis v. Apfel, 236 F.3d 503, 512 (9th Cir. 2001). "[A] boilerplate
25 finding is insufficient to support a conclusion that a claimant's
26 impairment does not do so." Id. Especially when the ALJ fails to
27 evaluate favorable evidence relevant to the criteria set forth in the
28 listing, remand may be appropriate to allow the ALJ to engage in a more

1 thorough analysis of the evidence. See Ribaudo v. Barnhart, 458 F.3d
2 580, 584 (7th Cir. 2006).

3
4 The ALJ should provide specific findings in the record to support
5 his conclusion that plaintiff does not meet or equal a listed
6 impairment. There is some probative evidence favorable to plaintiff's
7 claim that he meets or equals listing 1.04 that the ALJ did not consider
8 in reaching his conclusion. For example, plaintiff's medical records
9 show evidence of nerve root compression (A.R. 145), limited range of
10 motion (A.R. 133, 195), sensory deficit loss (A.R. 133), and positive
11 straight-leg raising tests (A.R. 133, 195). At the very least, there is
12 sufficient evidence to warrant a more careful examination of the record
13 and specific findings as to whether plaintiff meets or equals this
14 listing.

15
16 Accordingly the ALJ erred in concluding that plaintiff did not meet
17 listing 1.04 without citing to relevant evidence of record he considered
18 in reaching his determination.

19
20 **B. The ALJ's Failure To Consider Plaintiff's Obesity In**
21 **Assessing His RFC Does Not Constitute Error.**
22

23 Plaintiff also argues that the ALJ erred in failing to consider the
24 combined effect of plaintiff's obesity with his musculoskeletal
25 impairments in determining whether plaintiff has a listing level
26 impairment and the effect of plaintiff's obesity on his ability to work.
27 (Joint Stip. 7) The Court disagrees.
28

1 Plaintiff is correct that the ALJ has a duty to consider the
2 cumulative effects of obesity when determining whether plaintiff meets
3 or equals a listing and when assessing plaintiff's residual functional
4 capacity. See SSR 02-01p. However, plaintiff carries the burden of
5 establishing disability and must present medical evidence showing his
6 impairments. 20 C.F.R. § 404.1512(c). Where there is no evidence of
7 record to indicate that plaintiff's obesity limits his functioning or
8 exacerbates his condition, the ALJ is not required to discuss the
9 combined effects of obesity. See Burch v. Barnhart, 400 F.3d 676, 683
10 (9th Cir. 2005).

11
12 Plaintiff's suggestion that the ALJ erred in not considering the
13 effects of plaintiff's obesity on his functional limitations is
14 incorrect. Plaintiff presented his obesity as a limiting impairment for
15 the first time in the Joint Stipulation. (Joint Stip. 5.) The only
16 evidence of obesity to which plaintiff points is the Orthopedic
17 Evaluation summary in which plaintiff's height and weight are noted
18 without reference to "obesity." (A.R. 154.) Plaintiff performed an
19 independent calculation using the National Institute of Health
20 guidelines to determine that his Body Mass Index is 39.4, which is
21 considered "obese."³ (Joint Stip. 5.) However, while plaintiff may be
22 obese, he points to no medical evidence of record indicating that any
23 doctor noted or commented on his obesity. There is no evidence
24 whatsoever indicating that plaintiff's obesity caused him to experience
25 any functional limitation. Plaintiff's hearing testimony is also silent
26 on the issue of his obesity. Considering the lack of evidence of record

27
28 ³ NIH considers anyone with a BMI of over 30 to be obese.

1 regarding plaintiff's obesity or any limitation related thereto, the
2 ALJ's failure to consider plaintiff's obesity in his disability
3 determination does not constitute error. See Burch, 400 F.3d at 683.

4
5 **III. Remand Is Required.**

6
7 The decision whether to remand for further proceedings or order an
8 immediate award of benefits is within the district court's discretion.
9 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
10 useful purpose would be served by further administrative proceedings, or
11 where the record has been fully developed, it is appropriate to exercise
12 this discretion to direct an immediate award of benefits. Id. at 1179
13 ("the decision of whether to remand for further proceedings turns upon
14 the likely utility of such proceedings"). However, where there are
15 outstanding issues that must be resolved before a determination of
16 disability can be made, and it is not clear from the record that the ALJ
17 would be required to find the claimant disabled if all the evidence were
18 properly evaluated, remand is appropriate. Id.

19
20 Here, remand is the appropriate remedy to allow the ALJ the
21 opportunity to remedy the above-mentioned deficiencies and errors. See,
22 e.g., Benecke v. McCarthy, 379 F.3d 587, 593 (9th Cir. 2004) (remand for
23 further proceedings is appropriate if enhancement of the record would be
24 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.
25 1989) (remand appropriate to remedy defects in the record). On remand,
26 the ALJ must provide clear and convincing reasons for discrediting
27 plaintiff's subjective pain testimony. Additionally, the ALJ should
28 provide legally sufficient reasons, if such reasons exist, for finding

1 plaintiff does not meet or equal listing 1.04.

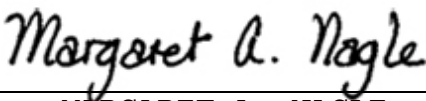
2
3 **CONCLUSION**

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5 Accordingly, for the reasons stated above, IT IS ORDERED that the
6 decision of the Commissioner is REVERSED, and this case is REMANDED for
7 further proceedings consistent with this Memorandum Opinion and Order.

8
9 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
10 copies of this Memorandum Opinion and Order and the Judgment on counsel
11 for plaintiff and for defendant.

12
13 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

14
15 DATED: February 9, 2010

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18 MARGARET A. NAGLE
19 UNITED STATES MAGISTRATE JUDGE
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